No. 84-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *ET AL.*,
Appellees.

On Appeal from the Supreme Court of California

JOINT BRIEF FOR THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE

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July 19, 1985

CASILLAS PRESS INC - 1717 K STREET NW WASH DC - 223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF AMICI CURIAE

The National Association of State Utility Consumer Advocates (NASUCA) and the National Association of Regulatory Utility Commissioners (NARUC) file this joint brief as *amici curiae* urging affirmance due to the substantial harm a reversal of the decision below will have upon the effectiveness of the regulation of investor-owned utilities by State regulatory commissions. The NASUCA and the NARUC submit this brief with the written consent of the Appellant and Appellees which is filed with the Clerk, pursuant to Supreme Court Rule 36.2.

The NASUCA is a national organization comprised of 37 members in 34 States and the District of Columbia which represent the interests of utility consumers before State regulatory commissions. The members of NASUCA primarily represent consumers in State commission proceedings, and State and Federal court actions involving investor-owned electric, natural gas, telephone and water and sewerage utilities.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Public Utilities Commission of the State of California (CPUC), Appellee herein, is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, these officials have the obligation to assure the establishment of electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of State constitutions or their respective legislatures, established to regulate utilities exercising monopoly powers within their service territories.

With rare exception, each utility subject to the jurisdiction of a State regulatory commission communicates with its ratepayers through the monthly or quarterly billing mechanism. According to information collected by the

NARUC, every State commission in the Nation regulates the billing practices of its jurisdictional utilities, including the authority to establish the type, kind and extent of information a utility must provide its customers.[1] The purpose of this type of regulation, *inter alia,* is to enable utility consumers to understand their charges for utility service, to calculate their bills through an itemized listing of their consumption, and to be provided other information affecting their economic interest as utility ratepayers.[2]

In the proceeding at bar, the California Supreme Court has affirmed an order of the CPUC requiring a jurisdictional utility (Pacific Gas & Electric Company, Appellant herein) to include in billing envelopes information provided by third parties. The NASUCA and the NARUC are deeply concerned that a reversal by this Court of the CPUC's decision will threaten the authority not only of States such as California which have established third party bill insert programs, but also will apply more broadly, leading utilities to question the authority of the State commissions to impose any requirements or restrictions on utility billing practices. Viewed in this light, this proceeding is of great importance to each State commission and to the consumer advocates that appear in State regulatory proceedings, regardless of whether or not a State has a third party insert program. Simply stated, the resolution of the issues raised in this case will affect State commissions and utility consumers nationwide.

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[1]National Association of Regulatory Utility Commissioners, *1983 Annual Report on Utility and Carrier Regulation* (Washington, D.C. 1984) at 566-573.

[2]*Id.*

ARGUMENT

I. APPELLANT HAS FAILED TO SHOW THAT THE CALIFORNIA PUBLIC UTILITIES COMMISSION HAS LIMITED ITS ABILITY TO COMMUNICATE WITH ITS CUSTOMERS.

Appellant Pacific Gas and Electric Company (PG&E) argues in its brief on the merits that the Order of the Supreme Court of California denying review of the CPUC decision limits its ability to communicate with its customers as a result of the inclusion of the Toward Utility Rate Normalization (TURN) insert in the billing envelope four times a year. Appellant argues that the ordered inclusion will replace its own publication, *Progress,* and thus restrict its ability to communicate with its ratepayers. (PG&E Br. at 11-13)

This argument has no merit. The CPUC decision does not bar PG&E from including *Progress* in the billing envelope with the TURN material. Appellant may include its own publication twelve months of the year. Four months of the year, however, it must also include a publication from TURN. The Order's only impact on PG&E's communication with its customers is the possibility that the inclusion of additional printed material with the mailing could result in the payment of additional postage. This extra cost, if in fact extra postage were required, creates no claim under the First Amendment.

Moreover, it neither prevents PG&E from communicating with its customers nor discriminates against the utility. PG&E would still be required to pay for use of postal service just as any other nonmonopoly company. The utility's status as a regulated monopoly means simply that any additional postage costs, should they occur, will be allocated by the CPUC among shareholders, ratepayers, and third party mailers such as TURN in accordance with State law and traditional regulatory principles. The First Amendment does not relieve PG&E from being required to "pay postage in a manner identical to other Postal Service patrons. . . ." *United States Postal Service v. Greenburgh Civic Associations,* 453 U.S. 114, 127 (1981). Indeed, the CPUC could have required the appellant's shareholders to bear the cost of mailing *Progress* to its customers from the outset. *Rochester Gas & Electric Corp. v. Public Service Commission,* 51 N.Y. 2d 823, 413 N.E.2d 359, 443 N.Y.S.2d 420 (1980), *appeal dismissed,* 450 U.S. 961 (1981). Therefore, the fact that the CPUC, or any State commission, requires a utility to include material in its billing envelope that in turn forces the utility to pay additional postage for non-required materials does not restrict the free speech rights of the utility company. It only means that the utility must pay the same costs as any other speaker to transmit its message.

II. THE QUESTION OF THE OWNERSHIP OF THE "EXTRA SPACE" IN THE BILLING ENVELOPE IS NOT BEFORE THE COURT.

PG&E and certain *amici* in support argue that the forced inclusion of the TURN billing insert improperly requires the utility to use *its* property to disseminate TURN's speech. (*See e.g.,* PG&E Br. at 11-13) This argument, although of superficial appeal, cannot withstand close scrutiny.

In a previous case, the CPUC determined that there is "extra space"[3] in the billing envelope and that space is paid

[3]The extra space results from the fact that the United States Post Office requires the payment of a set minimum amount per envelope for postage. The bill and return envelope do not weigh enough to use the full amount paid for. Thus the company is able to use that extra space to insert its own publication without incurring any additional postage.

for by ratepayers and is thus ratepayer property.[4] (Decision 93887, J.S. App. A-67, A-72, Paragraph 58). Under California procedures, the finding that the extra space has value that belongs to ratepayers cannot be relitigated, and therefore, is an issue not properly before this court. A decision which the California Supreme Court has refused to review is final and is *res judicata* to the issue. *People v., Western Air Lines, Inc.*, 42 Cal.2d 621, 268 P.2d 723 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal.3d 891, 160 Cal. Rptr. 124, 603 P.2d 41 (1979). Therefore, the Court should not decide this ownership issue.

III. THE DECISION OF THE CPUC WITHSTANDS FIRST AMENDMENT CHALLENGE EVEN IF THE "EXTRA SPACE" WERE NOT RATEPAYER PROPERTY.

Under the facts of this case, there is no need to address the usual First Amendment questions. The CPUC decision does not in any way significantly interfere with the ability of PG&E to communicate with its customers. It neither restricts the content of any utility messages nor prohibits any communications. However, PG&E has failed to raise a substantial free speech issue even under traditional First Amendment analysis. The utility's contention that the CPUC decision favors third party speakers is simply misplaced. The regulatory decision merely requires that PG&E include more than its own speech in the billing en-

[4]Justice Blackmun has suggested this very result in a decision involving State regulation of the utility billing envelope: ". . . States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders . . . If, under State law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 556 (1980) (Blackmun, J. dissenting).

velope. The CPUC found that its decision served a compelling governmental interest in the context of a regulated monopoly, because the Commission specifically found that consumers would benefit from exposure to more than one point of view, and that there was no adequate substitute to communication through the billing envelope.[5] To eliminate confusion concerning the source of the third-party message, the CPUC requires that any third-party enclosure state that its content are not endorsed by the Commission or PG&E. The Commisison has not attempted to prevent PG&E from inserting its own material opposing the TURN issues.[6]

In a recent decision involving State regulation of utility bill inserts, this Court stated that "where the government restricts the speech of a private person, the State action may be sustained only if the government can show that the regulation is a precisely drawn means of service a compelling State interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980). However, when the material to be regulated is content-neutral, these stringent standards need not be applied. *Id.* at 538. Content-neutral regulation is acceptable if it is narrowly tailored to serve a significant governmental interest and leaves ample alternatives for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. ____, 82 L.Ed.2d 221 (1984).

Despite PG&E's arguments to the contrary, the CPUC's decision to require third-party bill access in a content-neutral manner serves substantial and important governmental interest, namely to: (1) promote more complete

[5]*See* Appendix to CPUC Motion to Dismiss at A-27, A-36.

[6]*Id.* at A-28, A-39.

understanding of energy-related issues; (2) further consumer participation in Commission proceedings; (3) prevent the utility from taking for itself the economic value of the extra space owned by ratepayers; (4) remedy PG&E's violation of Federal ratemaking standards preventing utilities from conducting political advertising at ratepayer expense. (App. to CPUC M.D. at 8, 26-28, 32).

We submit that the governmental interest in widening the scope of involvement in the regulatory process is substantial. The CPUC, as an expert in the conduct of its own proceedings, determined that the best way to insure greater participation in its proceedings was to allow TURN to solicit funds through billing envelopes and to use those funds to represent the collective interest of PG&E's ratepayers in CPUC rate cases. Such a determination prevents the utility owners from benefitting from ratepayer-owned property, and also remedies prior unlawful use of that space.

PG&E also claims that the CPUC decision requires it to be associated with the views of others in violation of its rights under the Constitution. In making such an argument, the utility relies primarily on *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) and *Wooley v. Maynard,* 430 U.S. 705 (1977). PG&E Br. at 15-17. However, the recent *Zauderer* decision suggests that the California Supreme Court correctly upheld the CPUC decision. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. ____, 85 L.Ed.2d 652 (1985). There the Court upheld the right of free speech of Zauderer, but held, after citing *Tornillo* and *Maynard,* that Ohio could require certain disclosure requirements on ads to insure that they are not deceptive.

In *Tornillo,* the Court struck down a Florida statute

which required that a newspaper publish replies to charges made by the newspaper against a political candidate's personal character. 418 U.S. at 258. In so doing, the Court found that the attempt by the State to provide this "right of reply" constituted an unconstitutional "intrusion into the function of editors" by dictating the outcome of editorial decisionmaking. *Id.* In the case at bar, the CPUC has successfully avoided such direct editorial interference through its content-neutral scheme of third party access to PG&E's bill envelopes.

In *Maynard,* the Court held that the State of New Hampshire could not require its licensed drivers to display the State motto upon their vehicle license plates, since the State's interest to disseminate an ideology was too tenuous and since appellees were required to disseminate the motto publicly. 430 U.S. at 717. The Court in *Zauderer,* however, noted that the interests at stake there were different from *Tornillo* and *Maynard,* and focused on the concept of the value to consumers of commercial speech in upholding the State of Ohio's disclosure requirement scheme designed to prevent deceptive advertising. 85 L.Ed. 2d at 672.

The Court was clearly cognizant that such requirements implicated the advertiser's First Amendment rights to some extent but found the State's interests in aiding consumers to outweigh any burden resulting from disclosure. *Id.* at 673. In the instant case, the CPUC requires a disclaimer on TURN inserts but has not unconstitutionally sought to restrict the speech of the utility or qualified third parties chosen through a reasonable selection process. PG&E is not prohibited from replying to third party messages. Here the State regulator, as the replacement for competition in the marketplace, is in the best position to determine whether use of extra space in billing envelopes is

the best means for dissemination of information necessary to accomplish the substantial governmental interest of furthering consumer participation in rate proceedings. The only subclass of the public who would be receiving the third party messages under the CPUC plan are the ratepayers who are directly affected by that utility's approved rates and charges.[7] Appellant is neither prohibited nor compelled to speak. Its First Amendment rights may be implicated to some extent by the CPUC requirement of dissemination of TURN information, but they are not overly burdened, given the significant State interest in furthering consumer participation in rate proceedings and given the status of PG&E as a monopoly franchise providing utility service by choice in California. Applicants for rate increases, like PG&E, bear the burden of proving the reasonableness of their rate requirements, and commissions, like the CPUC, legitimately may seek to further consumer participation in proceedings to have additional facts before it during its deliberations. The CPUC has thus properly established reasonable regulation of access to the extra space in the billing envelope.

PG&E's claim that it is forced to be associated with the speech of another is also negated by this Court's decision in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980). There the Court concluded that the State of California could require the owners of a privately-owned shopping center to permit outside parties to collect signatures on petitions and distribute literature without infringing the owners' First Amendment rights. In reaching this

[7]In response to fears conveyed in *Maynard* regarding obliteration of the "In God We Trust" motto on U.S. currency, the Court observed that the bearer of currency is not required to advertise publicly the national motto. 430 U.S. at 717, n. 15. In the instant case Appellant is likewise not being required to disseminate information to the general public but only to its ratepayers.

conclusion, the Court found a number of characteristics which permitted the State to require that the public be granted access. First, although the owners of the shopping center sought to prevent persons from collecting signatures on a petition on its property, the shopping center was by choice open to public use. It was of such a size as to encompass several city blocks so that speakers and persons circulating letters and petitions were not likely to be identified with the owner. Second, the State had not attempted to dictate the content of anyone's speech. Third, the property owners were free to disclaim sponsorship of any petitions and to communicate their own messages if they wished. 447 U.S. at 87.

In like manner, PG&E is free to deny association with the TURN material. In fact, the CPUC order specifically requires TURN to label its material in such a way as to make it clear that neither PG&E nor the Commission sponsored the material. The utility is also a business open for public use, but unlike the shopping center is granted a monopoly status by the State. As such, it is subject to regulation by the State for the benefit of utility ratepayers. The CPUC decision represents a reasonable accommodation of the free speech interest of utilities and the interests of consumers in improved participation in the process of economic regulation of monopoly utilities.

CONCLUSION

For the foregoing reasons, the decision of the CPUC must be affirmed.

Respectfully submitted,

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